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IN THE
Supreme Court of the United States

CARL W. CLEVELAND,
Petitioner,

v.

UNITED STATES,
Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

REPLY TO BRIEF IN OPPOSITION

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TABLE OF CONTENTS

	Page
TABLE OF AUTHORITIES	ii
ARGUMENT IN REPLY	1
1. *Carpenter v. United States* Does Not Support the Decision Below	1
2. There Is a Conflict Among the Circuits	2
3. Petitioner's Argument Under *Neder* Was Not Waived	4
CONCLUSION	8

TABLE OF AUTHORITIES

Cases: Page

Abell v. Potomac Ins. Co., 588 F.2d 1104 (5th Cir. 1988), *vacated on other grounds sub nom. Fryar v. Abell*, 492 U.S. 914, *and cert. denied*, 492 U.S. 918 (1989) 6

Alberti v. Sheriff of Harris County, 937 F.2d 984 (5th Cir. 1991), *cert. denied sub nom. Richards v. Lindsay*, 504 U.S. 930 (1992) 5

Carpenter v. United States, 484 U.S. 19 (1987) 1, 2

DeGurules v. INS, 833 F.2d 861 (9th Cir. 1987) 5

DSC Communications Corp. v. Next Level Communications, 107 F.3d 322 (5th Cir. 1997) 5

Nations v. Sun Oil Co., 695 F.2d 933 (5th Cir.), *cert. denied*, 464 U.S. 893 (1983) 5

Neder v. United States, 119 S. Ct. 1827 (1999) 4, 5, 6, 7

Southwest Gaming Servs. v. Caddo-Shreveport Sales & Use Tax Comm'n, 661 So. 2d 662 (La. Ct. App. 1995) 4

Toulabi v. United States, 875 F.2d 122 (7th Cir. 1989) 3

United States v. Bucuvalas, 970 F.2d 937 (1st Cir. 1992), *cert. denied*, 507 U.S. 959 (1993) 3, 4

United States v. Evans, 844 F.2d 36 (2d Cir. 1988) 2

United States v. Martinez, 905 F.2d 709 (3d Cir.), *cert. denied*, 498 U.S. 1017 (1990) 2, 3, 4

United States v. McGuire, 79 F.3d 1396, *vacated on reh'g en banc*, 99 F.3d 671 (5th Cir. 1996), *cert. denied*, 520 U.S. 1251 (1997) 5

United States v. Moser, 123 F.3d 813 (5th Cir.), *cert. denied*, 522 U.S. 1035 (1997) 6

United States v. Olano, 507 U.S. 725 (1993) 6

United States v. Salvatore, 110 F.3d 1131 (5th Cir.), *cert. denied*, 522 U.S. 981 (1997) 3, 4

United States v. Sterner, 23 F.3d 250 (9th Cir. 1994) 5

Statutes:

La. Rev. Stat. Ann. § 33:4862.1(D) (recodified at La. Rev. Stat. Ann. § 27:301(D)) 4

TABLE OF AUTHORITIES—Continued

Rules: Page

Fed. R. Crim. P. 52(b) 5, 6

Miscellaneous:

Brief for the United States, *Neder v. United States*, No. 97-1985 7

Charles Reich, *The New Property*, 73 YALE L. J. 733 (1964) 2

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1. *Carpenter v. United States Does Not Support the Decision Below.*

In arguing that the Court of Appeals correctly decided the "property" issue, the government relies upon *Carpenter v. United States*, 484 U.S. 19 (1987). Br. Opp. 6-7. According to the government, "the State of Louisiana had a property interest in the unissued video poker licenses similar to the *Wall Street Journal*'s interest in maintaining the confidentiality of its business information." *Id.* 7. But this Court's opinion in *Carpenter* stressed that "Confidential business information has long been recognized

as property." 484 U.S. at 26. In support the Court cited four of its own decisions and a treatise on corporations; together those authorities demonstrated that since the early 1900s it had been established that confidential business information is a form of property. *See id.*[1]

In contrast, unissued licenses have never been considered property. That is confirmed by the government's Brief in Opposition: the sole authority cited as purportedly showing that an unissued license is property is *United States v. Martinez*, 905 F.2d 709 (3d Cir.), *cert. denied*, 498 U.S. 1017 (1990). Br. Opp. 7. There, the Third Circuit held that an unissued medical license was property of the Commonwealth of Pennsylvania under the mail fraud statute. But the only alleged support for that holding that the Third Circuit could find in the law of property was Professor Charles Reich's article *The New Property*, 73 YALE L. J. 733, 778 (1964), which opined that a license "is originally public property." *See Martinez*, 905 F.2d at 714. Plainly, there is an enormous difference between applying the mail fraud statute to what "has long been recognized as property," *Carpenter*, 484 U.S. at 26, and applying it to an interest treated as property only in a single law review article. *Carpenter* therefore does not support the government's position.

2. There Is a Conflict Among the Circuits.

Although the Court of Appeals acknowledged that "at the time of the charged conduct, a circuit split existed as to whether or not unissued licenses constituted property for purposes of the mail fraud statute," A. 20a, the government now argues, in effect, that the Court of Appeals

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[1] *See also United States v. Evans*, 844 F.2d 36, 41 (2d Cir. 1988) (noting that in *Carpenter* "the court pointed out that the right in quesion there—exclusive use of confidential business information—was recognized in various contexts").

erred in referring to a circuit slit. Br. Opp. 7-9. To a large extent, however, the conflict identified in the petition has not been disputed by the government. The government makes no attempt to reconcile the First and Third Circuit decisions in *United States v. Bucuvalas*, 970 F.2d 937 (1st Cir. 1992), *cert. denied*, 507 U.S. 959 (1993), and *Martinez* with the decisions of the many Circuits which have concluded that unissued licenses are not property.

Moreover, although the government does contend that *United States v. Salvatore*, 110 F.3d 1131 (5th Cir.), *cert. denied*, 522 U.S. 981 (1997), is distinguishable from the cases holding that unissued licenses are not property, its asserted distinctions focus on features of video poker operations in Louisiana that have no apparent bearing on whether unissued video poker licenses are property. Thus, the government stresses that applicants for video poker licenses pay an up-front licensing fee. Br. Opp. 8. But applicants for a wide variety of licenses must pay a fee in advance. *See, e.g., Toulabi v. United States*, 875 F.2d 122, 125 (7th Cir. 1989). There is nothing unusual about requiring payment of a fee prior to issuance of a license. The government also stresses that device owners are required to remit to the State a significant percentage of the revenues from video poker operations. Br. Opp. 8. Again, however, that the State stands to receive a benefit from the activities permitted by an issued video poker license, through receipt of a percentage of the revenues generated by the licensee's operations, hardly suggests that the State is deprived of property when it issues the license.

It remains the case that the "legislative purpose" of the video poker law was "to provide a comprehensive framework for the *regulation* of the video poker industry, vesting regulatory powers exclusively in the video gaming

division of the state police." *Southwest Gaming Servs. v. Caddo-Shreveport Sales & Use Tax Comm'n*, 661 So.2d 662, 663 (La. Ct. App. 1995) (emphasis added). Nothing in the statute or its legislative history suggests a legislative intent to give the State a property interest in video poker licenses. Indeed, whereas in *Bucuvalas* and *Martinez* the courts at least could point to the fact that, once issued, the licenses in question were property,[2] the Fifth Circuit's holding in *Salvatore* came in the face of an express statutory provision that even an issued video poker license "is not property or a protected interest under the constitutions of either the United States or the state of Louisiana." La. Rev. Stat. Ann. § 33:4862.1(D) (recodified at La. Rev. Stat. Ann. § 27:301(D)). There can be little question that the result in *Salvatore* would have been different had the Fifth Circuit not specifically rejected the distinction—which has been embraced by numerous other Circuits—between issued and unissued licenses.[3]

3. Petitioner's Argument Under *Neder* Was Not Waived.

The government concedes that the Court of Appeals did not consider this Court's ruling in *Neder v. United States*, 119 S. Ct. 1827 (1999), that materiality of falsehood is an element of mail fraud. *See* Br. Opp. 9-10. It nevertheless opposes a remand for consideration of *Neder*, contending that "a defendant waives appellate consideration of an issue raised for the first time in a reply or later supplemental brief." *Id.* 10. The government asserts that, in opposing petitioner's motion for supplemental briefing, it argued to the Court of Appeals that "the issue had been waived." *Id.* 5. The government's description of what it argued below is incorrect, and its claim of waiver is untenable.

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[2] *See Bucuvalas*, 970 F.2d at 945; *Martinez*, 905 F.2d at 712, 715.

[3] *See Salvatore*, 110 F.3d at 1140.

The government did not argue below that petitioner had waived *appellate* consideration of the materiality issue by not raising it earlier in the Court of Appeals. Instead, it argued that *Neder* is distinguishable because *at trial*, unlike the defendant in that case, the defendants here had not requested an instruction on materiality.[4] Of course, the absence of such a request would not preclude review for plain error under Fed. R. Crim. P. 52(b). The government also contended, as it does in this Court, that portions of the jury charge as given effectively conveyed a requirement of materiality.[5]

The government had good reason not to argue below that petitioner had waived appellate consideration of materiality: case law in the Fifth Circuit and elsewhere makes clear that, although appellate review generally is waived as to issues not raised in the appellant's opening brief, that rule is inapplicable where, as here, there is a subsequent change in controlling authority.[6] *Neder* was not decided until June 10, 1999, almost a year after petitioner filed his opening brief on appeal, and three months after the Court of Appeals heard oral argument.

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[4] *See* Government-Appellee and Cross-Appellant's Opposition to Motion To Allow Supplemental Briefing Concerning the Recent Decision in *Neder v. United States* by the United States Supreme Court (filed July 8, 1999) at 2-3.

[5] *Compare id.* at 3 *with* Br. Opp. 11.

[6] *See, e.g., DSC Communications Corp. v. Next Level Communications*, 107 F.3d 322, 326 n.2 (5th Cir. 1997); *United States v. McGuire*, 79 F.3d 1396, *vacated on reh'g en banc*, 99 F.3d 671 (5th Cir. 1996), *cert. denied*, 520 U.S. 1251 (1997); *Alberti v. Sheriff of Harris County*, 937 F.2d 984, 992-93, 998 (5th Cir. 1991), *cert. denied sub nom. Richards v. Lindsay*, 504 U.S. 930 (1992); *Nations v. Sun Oil Co.*, 695 F.2d 933, 936 (5th Cir.), *cert. denied*, 464 U.S. 893 (1983); *see also United States v. Sterner*, 23 F.3d 250, 252 n.3 (9th Cir. 1994); *DeGurules v. INS*, 833 F.2d 861, 864 (9th Cir. 1987).

At the time petitioner's opening brief was filed, petitioner had no viable issue to raise regarding the district court's failure to instruct that materiality is an element of mail fraud. The Fifth Circuit had expressly held that "Materiality and reliance . . . are *not* elements of either wire fraud or mail fraud." *Abell v. Potomac Ins. Co.*, 858 F.2d 1104, 1129 (5th Cir. 1988), *vacated on other grounds sub nom. Fryar v. Abell*, 492 U.S. 914, *and cert. denied*, 492 U.S. 918 (1989) (emphasis in original). *See also* Pet. Cert. 21 n.17.[7]

The government suggests that petitioner nonetheless should have raised the materiality issue in his opening brief, because there was then a conflict among the circuits on whether materiality is an element of mail or wire fraud. Br. Opp. 10. But because no instruction on materiality was requested at trial, review was available only under the plain error standard of Rule 52(b). It is settled law that "a court of appeals cannot correct an error pursuant to Rule 52(b) unless the error is *clear under current law*." *United States v. Olano*, 507 U.S. 725, 734 (1993) (emphasis added). At the time petitioner's opening brief was filed, any contention that the failure to instruct on materiality was clear error under current law would have been frivolous in light of *Abell*. When this Court's decision in *Neder* later provided support for such

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[7] Citing *United States v. Moser*, 123 F.3d 813 (5th Cir.), *cert. denied*, 522 U.S. 1035 (1997), the government asserts that the materiality issue was "an open one" in the Fifth Circuit at the time of petitioner's appeal. Br. Opp. 10. The government has misread *Moser*. In that case, the Fifth Circuit simply "assume[d] for purposes of this appeal" that materiality was an element of mail fraud, and then ruled against the defendants on other grounds. 123 F.3d at 826-27. In doing so, the court pointed out that the Fifth Circuit had previously held in *Abell* that "materiality is not an element of mail fraud." *Id.* at 826.

a contention, petitioner promptly moved for leave to file a supplemental brief.

The government's alternative argument is that the district court "did give an adequate materiality instruction." Br. Opp. 11. The record demonstrates otherwise. The court instructed the jury that the requisite scheme to defraud had to involve "false *or* fraudulent representations *or* omissions." R. 4407 (emphasis added). The court's passing reference to "material fact" ("a representation may be 'false' when it constitutes a half truth, or effectively conceals a material fact," *id.*) by its own terms concerned only one possible means of proving the alleged scheme—through "false" representations, as opposed to fraudulent representations or fraudulent omissions. It is impossible to know on what theory the jury based its verdict. Even as to false representations, the court did not say proof of materiality was essential, and the term "material" was wholly unexplained.

The government also cites the instruction that "the scheme must involve false or fraudulent representations or omissions reasonably calculated to deceive persons of ordinary prudence and comprehension." R. 4407. But that instruction does not concern materiality at all, as the government itself pointed out in its brief in *Neder*. *See* Brief for the United States at 47 n.27, *Neder v. United States*, No. 97-1985 ("Although the weight of authority supports the conclusion that it is no defense to a charge of mail fraud that the scheme at issue would not have deceived a reasonably prudent person, some courts of appeals have erroneously espoused the contrary view. . . . The disagreement among the courts of appeals, however, *does not in reality involve a question of materiality* . . . .") (emphasis added).

CONCLUSION

Certiorari should be granted.

Respectfully submitted,

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